Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1999

Wynne L. Creekmore, Jr.,

Petitioner,

vs.

Vasa North Atlantic Insurance Company,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas

FIRST SUPPLEMENT OF APPENDIX "C," "E," AND "F" PETITION FOR WRIT OF CERTIORARI

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PREAMBLE

It has been determined, after the March 17, 1999 delivery to the Court of Petitioner's Petition For Writ Of Certiorari ("Petition"), that the following appendix documents in the Petition should be supplemented, because they were inadvertently incomplete (Appendix "C" and "E") or had been omitted (Appendix "F"). Petitioner, Wynne L. Creekmore, Jr., respectfully requests that this Supplement be filed with the papers of this case and that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Texas as described in the Petition as hereby supplemented.

APPENDIX C - OPINION OF THE COURT OF APPEALS, FIRST DISTRICT, ISSUED APRIL 9, 1998

issued April 9, 1998

THE STATE OF TEXAS
In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-96-01294-CV

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WYNNE L. CREEKMORE, JR., Appellant

V.

VASA NORTH ATLANTIC INSURANCE COMPANY, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 645,079

OPINION

Appellee VASA North Atlantic Insurance Company sued appellant Wynne L. Creekmore, Jr. for breach of contract arising out of Creekmore's failure to reimburse VASA $9,823.08 on two $5,000 deductibles on his professional liability insurance policies. Creekmore counterclaimed,

alleging violations of the Equal Credit Opportunity Act[1] and tortious interference with contract. The trial court rendered an interlocutory summary judgment for VASA for $7,823.08 on VASA's claims against Creekmore. The trial court later rendered a final judgment dismissing Creekmore's counterclaims and awarding attorney's fees to VASA. Creekmore appeals in three points of error. We affirm in part and reverse in part.

In point of error one, Creekmore contends the trial [sic] erred in rendering summary judgment because there is a fact question regarding his Equal Credit Opportunity Act claim. The standards for reviewing a motion for summary judgment are well established: (I) the movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Creekmore's Equal Credit Opportunity Act claim arises out of an installment promissory note VASA offered to Creekmore as a way to repay the $3,000 balance he owed on the first policy deductible. Creekmore claims VASA did not comply with the Act after Creekmore rejected the offer of the promissory note.

The elements of an Equal Credit Opportunity Act claim are: (1) the applicant is a member of the protected class; (2)

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[1] 15 U.S.C. § 1691-1691f (1994)

the applicant in fact applied and was qualified for credit; and (3) the applicant was denied credit notwithstanding his qualifications. See generally *Moore v. United States Dep't of Agric. ex rel. Farmers Home Admin.*, 55 F.3d 991,993 (5th Cir. 1995). VASA, however, never denied credit to Creekmore. Creekmore judicially admits in his first amended counterclaim that he did not accept VASA's offer of credit, not vice-versa. Accordingly, the trial court did nor err in dismissing Creekmore's Equal Credit Opportunity Act claim.

We overrule point of error one.

In point of error two, Creekmore contends the trial erred in rendering summary judgment regarding his tortious interference-with-contract claim because the statute of limitations has not run. The essence of Creekmore's tort claim is that VASA exercised an improper amount of control over the choice of attorneys hired to represent Creekmore under the professional liability insurance policies.

VASA contends Creekmore's tortious-interference-with-contract claim is barred by the two-year statute of limitations for personal injury claims. See Act of May 17, 1985, 69th Leg., R.S., ch. 959, sec. 1, § 16.003, 1985 Tex. Gen. Laws 3242, 3252 (Tex. Civ. Prac. & Rem. Code Ann. §16.003, since amended). Because VASA issued the first policy on May 16, 1991 and the second policy on May 16, 1992, it argues Creekmore had until May 16, 1993 and May 16, 1994 to file these claims. Creekmore filed the claims on November 1, 1995.

On summary judgment, it is VASA's burden to establish as a matter of law when Creekmore's tortious-interference-with-contract claim accrued for the purpose of applying the statute of limitations. *Foreman v. Pettit Unlimited, Inc.*, 886

S.W.2d 409, 411 (Tex. App-Houston [1st Dist.] 1994, no writ). VASA's attempt to discharge this burden by claiming the cause of action accrued when the policies were issued must fail. A cause of action accrues when a wrongful act occurs resulting in some injury to the plaintiff. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). VASA has not proved, as a matter of law, when the alleged wrongful act occurred.[2] We conclude that VASA has not proved the statute of limitations has run, so the trial court erred in dismissing Creekmore's tortious-interference-with-contract claim.

We sustain point of error two.

In point of error three, Creekmore contends the trial erred in rendering summary judgment because part of VASA's summary judgment evidence allegedly consisted of a duplicate affidavit. Creekmore argues for the first time on appeal that VASA had a duty under Texas Rule of Civil Evidence 1003 to identify the document as a duplicate. This point is waived because Creekmore did not object in the trial court and obtain an adverse ruling. See TEX. R. APP. P.33.1.

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[2] Creekmore specifically points to a February 14, 1994 telephone message left by VASA's attorney as an example of a wrongful act. The message, as recorded by Creekmore's receptionist, was, "if you want to start acting like [an] adult + professional - it will be appreciated [.] If you want to act like [a] 13 yr. Old - let him know." VASA dismisses the telephone call as a mere continuation of the pre-existing cause of action.

We overrule point of error three.

We reverse the trial court's judgment in part regarding Creekmore's tortious-interference-with-contract claim, affirm the remainder of the judgment, and remand the case for further proceedings limited to Creekmore's tortious-interference-with-contract claim.

s/ Frank G. Evans[3]
Justice

Panel consists of Justices Mirabal, Taft, and Evans

Do not publish. Tex. R. APP. P. 47.

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[3] The Honorable Frank G. Evans, retired Chief Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

APPENDIX E - TRIAL COURT ORDER DENYING MOTION FOR NEW TRIAL, ISSUED SEPTEMBER 4, 1998

NO. 645,079

IN THE COUNTY CIVIL COURT
AT LAW NUMBER ONE (1) OF HARRIS COUNTY, TEXAS

VASA NORTH ATLANTIC INSURANCE COMPANY

V.

WYNNE L. CREEKMORE, JR. D/B/A WYNNE L. CREEKMORE, JR.
ATTORNEY AT LAW

ORDER

It is ORDERED, ADJUDGED and DECREED that the Motion for New
Trial of Defendant/Counter-Plaintiff Wynne L. Creekmore, Jr. d/b/a Wynne L. Creekmore, Jr., Attorney at Law is DENIED.

SIGNED this 4th day of September, 1996.

s/ The Honorable Eugene Chambers
Judge Presiding

APPROVED AS TO
FORM AND SUBSTANCE:

McFall, Sherwood & Sheehy, P.C.
s/ Donald B. McFall

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APPENDIX F - ORDER OF THE COURT OF APPEALS, FIRST DISTRICT, OVERRULING APPELLANT'S MOTION FOR REHEARING, ISSUED MAY 18, 1998

The State Of Texas
In The
Court of Appeals
For The
First District Of Texas

NO. 01-96-01294-CV

WYNNE L. CREEKMORE, JR., Appellant

V.

VASA NORTH ATLANTIC INSURANCE COMPANY, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 645,079

ORDER

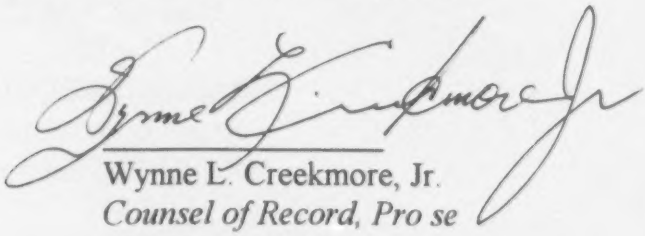
On this day came on to be considered Appellant's(s) motion for rehearing. And such motion is hereby OVERRULED.

Dated May 18, 1998.

Margie Thompson, Clerk
s/ Joann Aguirre, Deputy

PRAYER

Petitioner respectfully requests that this First Supplement of Appendix "C," "E," and "F" to his Petition For Writ Of Certiorari be received for filing with the papers of this case and that the Petition For Writ Of Certiorari be granted.



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